IN THE

Supreme Court of the United States

October Term, 1971

No. 71-901

PHILIP GROOB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRUNO SCHACHNER
Attorney for Petitioner
655 Madison Avenue
New York, New York 10021
(212) 688-7200

HERBERT BERMAN
Of Counsel

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Petitioner Philip Groob respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of conviction of the United States District Court for the Southern District of New York for the crimes of bribery in violation of 18 U.S.C. §201 (b) and conspiracy in violation of 18 U.S.C. §371.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported and is annexed hereto as Appendix A.

Jurisdiction

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on November 17, 1971. Orders denying, respectively, a petition for rehearing and rehearing in banc, were entered on December 14, 1971. The judgment and the orders are annexed hereto as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

No application has been made for an extension of time within which to file this petition.

Questions Presented

In a bribery prosecution where the sole issue was whether the defendant had been entrapped was it error:

(1) not to require that the government prove beyond a reasonable doubt that a government agent had not induced the commission of the crime;

(2) to instruct the jury that unless there was "credible" evidence that the defendant was lured or

induced, the entrapment defense had not been established;

(3) not to specify that the required "credible" evidence of defendant's innocence did not have to persuade the jury beyond a reasonable doubt; and

(4) not to find entrapment as a matter of law where the undisputed facts show defendant's lack of propensity and government conduct designed to elicit a bribe offer from an unwilling defendant.

Statement of the Case

The petitioner, the defendant below, has been an accountant for about thirty years. His practice was confined to the humblest aspects of his profession, and prior to the events in this case, he had but little contact with the Internal Revenue Service (S.M. 345-348).* His home was his only office. However, he also maintained a telephone at the office of a relative. That telephone was answered exclusively by an answering service, which took messages for him (S.M. 330-332, 341-343).

A sinister—but wholly absurd—interpretation put upon a suggestion by the defendant that an Internal Revenue agent could best reach him at home, rather than through the answering service, led to the events which are the subject matter of this case.

In December 1967, Singer, the revenue agent, began an audit of the income tax return of one Gross ("tax-

* Numbers preceded by the symbol "S.M." refer to the appropriate pages of the stenographic minutes of the trial.

payer"), and the defendant, who had prepared the return, handled the audit as the taxpayer's representative. In the course of the audit the revenue agent questioned a purported gift of $30,000.00 to taxpayer's wife by her father (S.M. 24). Evidence tending to substantiate the gift was transmitted to the revenue agent but the audit drifted into seeming inactivity.

Meanwhile, although the defendant and the taxpayer were not aware of it, the revenue agent was doggedly, but unsuccessfully, trying to persuade the Internal Revenue Service to conduct a fraud investigation. First he tried to interest a group in the Internal Revenue Service which was investigating Swiss bank accounts, and when he failed to arouse any interest there, he made several attempts to interest Special Agents in investigating possible fraud. It was explained to him that there was not enough evidence to warrant a criminal investigation and that he should close the case and set up civil fraud penalties in his report, but for no apparent reason, he failed to do so (S.M. 13, 239-246).

When almost two years had passed since the audit began, the defendant called the revenue agent to ascertain whether the matter could not be finished. A meeting at the office of the Internal Revenue Service was arranged for December 15, 1969. At that meeting the revenue agent told the defendant that he had come to the conclusion that the $30,000.00 should be considered additional income of the taxpayer for the year 1965, and that he proposed the

* There was never any suggestion or suspicion that the defendant was implicated in the possible fraud.

assessment of additional taxes amounting to about $10,000.00, and appropriate interest (S.M. 25, 262).

The defendant asked for an opportunity to discuss the whole matter with the taxpayer and promised to report back in twenty-four hours (S.M. 256, 268, 359). Actually, there was a delay of several days until at last the two spoke to each other over the telephone (S.M. 279, 58, 61). The defendant explained that his client wanted him to explore the possibility of a "compromise." It would be time-consuming and expensive to go through the administrative and judicial review process and perhaps the money that would otherwise be consumed in lawyers' fees could be used to discharge a compromised liability. The revenue agent did not think that a compromise was possible. The defendant urged him to consult his superiors and the revenue agent undertook to do so before giving his final answer (S.M. 265, 279, 365).

Since there had been some difficulty about reaching the defendant, the defendant suggested that the revenue agent call him at his home number to tell him what he had found out from his superiors about the possibility of a compromise. He explained that he rarely left his home before nine o'clock in the morning while the agent started work at eight-thirty, and if the agent could call him at home between eight-thirty and nine, there would be no difficulty about reaching him (S.M. 362).

The revenue agent never spoke to his supervisor about the possibility of a compromise. Instead he told his supervisor that he suspected an attempt would be made to

bribe him. He based his suspicion solely on the fact that the defendant had suggested that he could best be reached at home (S.M. 185-187). The supervisor directed the revenue agent to the Inspection Service which polices Internal Revenue agents and practitioners. The Inspection Service—unlike all the other branches of the Internal Revenue Service which the revenue agent had tried to interest in the importance of his case—took the agent's suspicion seriously and arranged for elaborate electronic surveillance of telephone calls and meetings. Granted that the government agents might not have known that defendant's home was his only office, it is difficult to understand why a telephone call emanating from a government office but directed to a home should be considered a more likely instrumentality of crime than one directed to an office.

In any event, the revenue agent called the defendant at the latter's home, from a telephone to which the Inspection Service had attached a recording device, and the ensuing conversation was recorded. The recording contains nothing that smacks even remotely of a bribe offer. Again, the defendant wanted a compromise, but the revenue agent could not see how a compromise could be arranged. The defendant said he knew that such issues were customarily compromised, although he did not know how such a compromise was to be handled. He urged the agent to discuss the matter with his superiors to find out from them how a compromise could be arranged (Exhs. 4, 4A, S.M. 14, 18, 26, 364-371).

The agent, on the other hand, wanted to arrange a meeting between himself, the defendant and the taxpayer,

but the defendant could see no purpose whatever to such a meeting and flatly refused to take part in it (S.M. 18, 289). The only purpose for which the defendant was willing to attend a meeting was to try once more for a compromise. To overcome defendant's reluctance to meet him, the agent again promised to consult his superiors about the feasibility of a settlement, and on this basis an appointment was made for the agent to meet the defendant and the taxpayer at the latter's office (Exh. 4A, S.M. 18, 289, 297).

The Inspection Service made elaborate preparations to record the conversations at that meeting. When the agent appeared at the taxpayer's office, he carried a brief case in which a recording device was hidden. A microphone connected to a small wireless transmitter was strapped to his body. On the street adjoining the office were numerous agents of the Inspection Service in two cars. In each car was a receiving and recording device to record the radio signals emanating from the concealed transmitter (S.M. 20, 23, 72-82).

According to Internal Revenue Service testimony, the electronic surveillance was plagued by misfortune. The recording apparatus in the briefcase did not function at all (S.M. 85). That in one of the two cars just barely functioned, but the resulting recording (Exh. 5) is frequently unintelligible; that in the other car functioned even more poorly (S.M. 101).

There is no controversy as to what happened at the meeting at the taxpayer's office. The agent, who in order to bring about the meeting had promised that he would con-

sult with his superiors about the possibility of a compromise, did not even pretend that he had done so. He stated his conclusion that he would exact from the taxpayer $10,000 as additional taxes for 1965, together with twenty-four percent accumulated interest (S.M. 292). He repeated his position again and again, stressed the subjective nature of his determination, and kept reiterating, "Think about it" (S.M. 298-299, 372). The defendant asked him what there was to think about, but he supplied no answer. One is extremely hard-put to fathom what there might have been to think about—other than bribery, (S.M. 303). There was no progress at the meeting. Again the defendant asked the revenue agent to discuss the matter with the latter's superiors.

When the meeting broke up, it was necessary for the defendant to conduct the revenue agent to the corridor, because the taxpayer's premises (he is a diamond dealer) were protected by elaborate safety devices (S.M. 373-374). As to what happened after the two reached the corridor, the testimony is in sharp conflict.

According to the revenue agent, the defendant offered him $2500 to quash the case, $500 of which the revenue agent was to give to the defendant (S.M. 31-33).

The defendant testified that, as soon as he and the revenue agent reached the corridor, the revenue agent motioned him into an alcove and made a gesture with his hands indicating the payment of money. In a whisper he then suggested that, if he were paid for it, he would be willing to quash the case. The defendant asked the revenue agent to wait. He rushed back to the taxpayer, whom he

told what had just happened, but he also added that he wanted nothing to do with it. The taxpayer became hysterical and appealed to the defendant on the basis of their long relationship to talk further with the revenue agent. The defendant finally agreed to listen to what the revenue agent had to say, rejoined him in the corridor, and took him to the office of some acquaintance, since the taxpayer was in no condition to talk to anybody (S.M. 374-378).

There was some discussion about the price which was finally fixed at $2500. Since the defendant was, as he put it, to act as "collector" for the revenue agent, the agent was to pay him $500 for his services (S.M. 380).

The government's vast effort at electronic surveillance, with all its prejudicial effect on the jury, supplied not a scintilla of evidence that the defendant initiated the scheme. The recording of the conversation (Exh. 5) is completely silent precisely when bribery must have been first mentioned. Later, however, the defendant can be clearly heard to say to the agent, "How much do you want?"

Even more startling is the fact that the crucial gap in the electronic proof was never filled. Both the Inspection Service and the revenue agent were acutely aware of the vital importance of the entrapment problem (S.M. 17, 186-187).

After it was clear that it was impossible to determine from the recording who first suggested the bribe, three more recorded conversations took place. The revenue agent could easily have supplied the missing corroboration

of his testimony, particularly in one conversation in which the defendant explained to the revenue agent how much he regretted that he had let himself drift into the whole transaction (S.M. 433-434). All the agent had to say, and let himself be recorded as saying, was that the defendant was the one who had proposed the scheme. The fact that this was not done suggests that the agent may have feared an emphatic recorded denial.

Without belaboring the point, it is fair to say that there was no evidence of "propensity," and much to show lack of it; the conflicting evidence related solely to the issue of "inducement", and the government's evidence was far from conclusive on that issue. In this posture of the case the outcome might easily have turned on how the burden of proof was allocated. In pertinent part, the trial judge instructed the jury, as follows:

> "Thus, in considering the defense of entrapment, you must first consider all the evidence and determine whether or not there is credible evidence that Groob was lured or induced by Agent Singer to have $700 paid to Singer, as was done here, or to conspire with Gross to do so.
>
> "If you conclude there is no credible evidence that Groob was so lured or induced by Singer, then you need go no further with the defense of entrapment; or, if there was no such inducement or luring here, Groob was not entrapped. On the other hand, if after considering all the evidence you conclude that there is credible evidence that Groob was lured or induced by Singer to participate in the payment of the $700, you must then go on to consider a second question. That is, whether or not the government has established beyond a reasonable doubt that Groob, prior to such

inducement, was ready and willing to commit the offenses charged and was merely awaiting an opportunity to do so." (S.M. 541-542)

Reasons for Issuing the Writ

1. The decision of the Court of Appeals is in conflict with the decisions of other circuits and deals with an important question of federal law which has not been, but should be, settled by this Court.

The cryptic opinion of the Court of Appeals tends to obscure the significance of its holding. It is nothing less than a reassertion, in its starkest form, of the rule of the Second Circuit that there is an issue concerned with guilt, namely entrapment, on one aspect of which the defendant has the burden of proving his innocence. This rule is without parallel in federal law. It is in conflict with the dominant trend of decisions in other circuits, and it is the source of much uncertainty and continuous litigation.

The difficulty which some courts have experienced in formulating fair instructions in dealing with proof of entrapment stems from the analysis of the problem by Judge Learned Hand in *United States* v. *Sherman*, 200 F. 2d 880, 882 (2d Cir. 1952):

> "In such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; and on the second the prosecution has it."

The extent of the burden which Judge Hand thought was on the accused is by no means clear. There is general agreement that, if there is no evidence of inducement in the prosecution's case, the accused has the burden in the sense that he must come forward with "some" evidence of inducement in order to raise the entrapment issue. In this respect insanity and entrapment are alike; neither issue is ordinarily submitted to the jury unless it is presented by "some" evidence. By holding that the term "credible" evidence is "virtually identical" with "some" evidence, the Court of Appeals disregards the ordinary meaning of words and converts the mere burden of raising the issue into a burden of persuasion that the evidence is "credible".

Evidence to raise the issue of entrapment can be literally "incredible", but it is still legally sufficient.

> "The issue of entrapment is presented 'however incredible * * *' [the evidence which raises it] might appear to the trial court or to [the appellate] court." Ianft v. United States, 198 F.2d 760, 762, 33 A.L.R. 2d 879 (9th Cir. 1952). We believe that if the defense of entrapment is claimed, a showing, however presented, that the commission of the offense was attended by the intervention of a government agent is sufficient." *Notaro* v. *United States*, 363 F.2d 169, 174, fn.6 (9th Cir. 1966).

Conversely, the burden on the defendant is significant, if the jury must find the evidence of defendant's innocence credible. The trial judge was keenly aware of this distinction between "some" evidence and "credible" evidence, for he deliberately chose the latter as defendant's

burden, after the defendant strongly urged the former. The difference was crucial. No sane jury could have doubted that there was "some" evidence of inducement, since the defendant testified to this effect. But under the charge, he may have been convicted because he did not convince the jury that his evidence was credible, although his guilt was not established beyond a reasonable doubt. The charge thus partakes of the vice of the instructions generally permitted in the Second Circuit—most recently in *United States* v. *Brazer*, —— F. 2d —— (2nd Cir. Oct. 28, 1971, Docket No. 71-1329)—according to which the accused has the burden of proving inducement by a preponderance of evidence.

As far as we can determine, all other circuits which have squarely passed on the issue have rejected this allocation of the burden of proof and put the entire burden on the government to prove beyond a reasonable doubt that the accused was not entrapped. *Johnson* v. *United States*, 317 F. 2d 127 (App. D.C. 1963); *Kadis* v. *United States*, 373 F. 2d 370 (1st Cir., 1967); *Notaro* v. *United States*, 363 F. 2d 169 (9th Cir., 1966); cf. *United States* v. *Laudani*, 257 F. 2d 425, 430 (7th Cir., 1958).**

Recently the Fourth Circuit went beyond the issues of the case before it to announce that it would not follow the

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* A petition for certiorari is about to be filed in *Brazer* (No. ——, Oct. Term 1971), so that the opinion, which has not yet been officially reported, will be readily available to the Court in the appendix to that petition.

** The Sixth and Eighth Circuits have approved charges which put the burden of proving inducement on the government without stressing the point. *United States* v. *Curtis*, 430 F. 2d 1159, 1161-1162 (6th Cir. 1970); and *Cross* v. *United States*, 347 F. 2d 327, 329 (8th Cir. 1965).

Second Circuit rule. In *United States* v. *Devore*, 423 F. 2d 1069, 1071 (1970), the Fourth Circuit said:

> "In *Kadis* the First Circuit correctly formulated the rule: if the defendant, through government witnesses or otherwise, shows some indication that he was corrupted by government agents, the burden of disproving entrapment will be on the prosecution."

The only support for the position of the Second Circuit can be found in a strong dictum by the Fifth Circuit. *Pierce* v. *United States*, 414 F. 2d 163, 167 (5th Cir. 1969), *cert. denied*, 396 U.S. 960.

The Second Circuit itself has repeatedly doubted the justice of its own rule. In *United States* v. *Puglisi*, 346 F. 2d 861, 863 (2nd Cir. 1965) the Court, after deciding that the accused could "at most" be held to a burden of proof by a preponderance of evidence, goes on to say, "if indeed he should bear any burden of proof whatever, a question we do not now reach." Similarly, in *United States* v. *Cohen*, 431 F. 2d 830, 832 (2nd Cir. 1970) there is an indication that the Second Circuit might abandon its rule. Even in *Kraver*, *supra*, while permitting a charge which puts part of the burden of proof on the accused permissible, the Court indicates that a charge which, in effect, puts the entire burden of proof on the government would be preferable.

Experience has proved, however, that mere exhortation has not been enough. In practice, the gap between the permissible and the desirable has become a fertile field for litigation. *Kraver* cites about a dozen recent cases in the Second Circuit alone, most of them decided within the last

two years, which are concerned with one aspect or another of the accused's burden in connection with entrapment. The list is by no means exhaustive and, of course, takes no account of the uncertainty of the law in other jurisdictions. This very case makes the exhortations of *Bracey* useless, for by equating "some evidence" with "credible evidence," it puts the burden of proof, in slightly different guise, once more on the defendant.

Even if the rule of the Second Circuit were desirable, it would still encounter the difficulty of having a jury apply two subtly differing standards in appraising the evidence. This consideration led to the abandonment of the rule in the First Circuit. The history of this evolution is summarized in *Kadis* v. *United States*, *supra*. Initially, the First Circuit had held that the defendant's evidence must merely preponderate.* *Gorin* v. *United States*, 313 F. 2d 641 (1st Cir. 1963), *cert. denied*, 374 U.S. 829.

> "Later, however, since it was clear that the government must show the predisposition of the defendant beyond a reasonable doubt and since we were troubled by the potential confusion introduced by requiring the jury to be instructed on two different burdens, we held that there is no burden of proof on the defendant even as to inducement. Sagansky v. United States, 1 Cir. 1966, 358 F 2d 195, cert. den. 385 U.S. 816, 87 S. Ct. 36, 17 L. Ed. 2d 55. All that we there required was that there be some evidence indicating that the defendant was induced." 373 F. 2d at 373.

* *Gorin*, like *United States* v. *Pugliese*, *supra*, holds that the extent of the defendant's burden must be defined for the jury, else the jury might conclude that defendant's burden was to adduce proof beyond a reasonable doubt. Judged by this standard, the charge in this case is defective, because "credible evidence" is not readily identified by a jury of laymen as proof by a mere preponderance of evidence.

The Court concluded that the ends of justice would best be served by further simplification. It abandoned the division of entrapment into sub-issues of inducement and predisposition. Henceforth the Court proposed to look, singly, at the ultimate issue of entrapment.

> "If the defendant shows, through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government." *Id.* at 374.

It would seem that the intervention of this Court is called for if rules productive of so much controversy and confusion, as well as unfairness, are to be replaced, once and for all, by the simple and sound rule which *Kadis* adopted.

2. The decision below is in conflict with applicable decisions of this Court.

Whatever may have been thought of the propriety of casting upon a defendant the burden of proving himself innocent, it surely did not survive *In re Winship*, 397 U.S. 358 (1970), in which this Court said:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

The Court of Appeals does not discuss the impact of *Winship* on its allocation of the burden of proof, but the slightly earlier opinion in *United States* v. *Bracey*, *supra*,

reconciles the two on the ground that the entrapment defense does not involve any of the essential elements of the crime.

It is idle to dispute this subtle distinction. It hardly accords with *Sorrells* v. *United States*, 287 U.S. 435 (1932) which assumes that Congress intended to exempt from the sweep of criminal statutes, alleged offenses which are "the product of the creative activity" of government officials.

> "[A] case of entrapment was implicitly excepted from the statutory definition of the crime." *United States* v. *Riley*, 363 F. 2d 955, 957 (2nd Cir. 1966).

In this respect it differs little from insanity. Yet it is clear from the reliance of *Winship* on *Davis* v. *United States*, 160 U.S. 469 (1895), and the dissenting opinion of Mr. Justice Frankfurter in *Leland* v. *Oregon*, 343 U.S. 790, (1952), that Due Process requires that the prosecution, in appropriate cases, dispel all reasonable doubt that the accused was legally insane. Cf. *United States* v. *Vaitch*, 402 U.S. 63 (1971).

A more realistic approach is to agree with the observation of the Court below that the entrapment defense deals with guilt. It is the concensus of courts and scholars that it rightly constitutes a valid defense. 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS ["WORKING PAPERS"] 312 (1970). *Winship*, fairly construed, commands that the determination that the accused is a criminal be made by proof which measures up to the beyond-a-reasonable-doubt standard. It is difficult to perceive any social values which might be served by

branding as a criminal anyone whose guilt has been less convincingly demonstrated.

Leland v. *Oregon*, *supra*, is the sole instance—outside of the *sui generis* area of presumptions—in which this Court had deemed it permissible to require the accused, in effect, to persuade a jury that he is innocent. Cf. 1 WORKING PAPERS 18-32. *Winship* must be deemed to overrule *Leland*, but in any event, it never applied in federal courts. The freakish rule that the government does not have to prove guilt beyond a reasonable doubt in cases involving entrapment is without analogy. In the language of *Winship*, it dilutes "the moral force of the law" by leaving "people in doubt whether innocent men are being condemned."

It would seem that *Winship* reenforces a rule of fundamental fairness which should be applied to entrapment as well.

3. The uncontroverted facts show entrapment as a matter of law.

The Court of Appeals seems to hold that, since the entrapment defense is directed to avoiding guilt and not to the propriety of governmental conduct, the issue is always one for the jury. Obviously this language does not apply to uncontroverted proof. *United States* v. *Sherman*, 356 U.S. 369 (1958). The only controverted fact in the case was whether the agent or the defendant first mentioned the bribe. Perhaps this case would never have been brought if the recording instruments had not miraculously failed at this very point. But the recordings do establish affirmatively that, up to a few minutes before

the first discussion of the bribe, the defendant was lacking in pre-disposition to commit the crime. Surely his efforts to persuade the agent to discuss a compromise with his superiors were completely inconsistent with the notion that he was simultaneously hatching a scheme to bribe. If the agent had, in fact, discussed the case with his superiors, instead of leading the defendant on with false promises, the possibility of bribery would have been virtually eliminated, for the decision would have been made on the basis of the advice given by others.

Even if it were assumed that the defendant first mentioned the bribe, the conduct of the agent was such that it amounted to a very thinly veiled solicitation of a bribe. Cf. *Lopez* v. *United States*, 373 U.S. 427, 435 n. 6 (1963). Behavior less objectionable than that indulged in by the agent here, constitutes sufficient proof of inducement and in appraising its significance the fact that the agent had been "wired" is important. *United States* v. *Cohen*, 431 F. 2d 830, 832 n. 2 (2nd Cir. 1970).

Since both the "inducement" and the "lack of predisposition" were essentially uncontroverted, the question who first mentioned the bribe is irrelevant. In *United States* v. *Klosterman*, 248 F. 2d 191 (3rd Cir. 1957) the first suggestion that a bribe be paid came from the taxpayer, Klosterman. In holding that entrapment had, nevertheless, been established as a matter of law, the Court said concerning the taxpayer:

> "But an added element in this case makes his conviction even more shocking to justice. His tax returns had been under investigation for an unusual length of time. During the period of investigation, Kloster-

man had numerous interviews with various agents and never once suggested an improper settlement of his tax liabilities. Thus, far from evidence of a predisposition to commit this crime, this case presents affirmative evidence to the contrary. The lengthy investigation of Klosterman's returns without a decision either to prosecute criminally or to seek civil remedies must certainly have had the effect of causing him at least some measure of anxiety. This subtle, although of course unintentional, conditioning of Klosterman would naturally have the effect of making him more susceptible to the persuasion of [the Government agents] . . ." *Id.* at 196.

It is equally apparent that the long delay and the odd conduct of the revenue agent in this case were the cause of the bribery, irrespective of who first mentioned it.

It would seem particularly desirable to limit permissible stratagems in the field of bribery. There is only a shadowy dividing line between bribery and extortion. If "inducement" is permitted to go too far, it is all too likely to make an unwilling criminal out of a despairing innocent.

Conclusion

Wherefore, it is respectfully prayed that the Court grant the petition for a Writ of Certiorari.

Respectfully submitted,

Bruno Schachner
Attorney for Petitioner

Herbert Berman
Of Counsel

Appendix A

Opinion of Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 344—September Term, 1971.

(Argued October 29, 1971 Decided November 17, 1971.)

Docket No. 71-1695

UNITED STATES OF AMERICA,

Appellee,

v.

PHILIP GROOB,

Defendant-Appellant.

Before:

LUMBARD, HAYS and OAKES,

Circuit Judges.

PER CURIAM:

In this appeal from a conviction for bribing and for conspiring to bribe an Internal Revenue agent, appellant claims that the trial judge's charge to the jury on the issue of entrapment was erroneous, and that the conduct of the government agents in this instance was so unconscionable as to constitute entrapment as a matter of law. We find

both these contentions without merit, and affirm the conviction.

The trial judge charged that the defense would have adequately raised the entrapment issue if the jury found "credible evidence" that government agents had induced Groob to commit a crime. Appellant claims that the word "credible" did not adequately define the burden of proof, and that the jury might even have assumed that the defense had to prove inducement beyond a reasonable doubt. We disagree. "Credible evidence" is virtually identical to "some evidence," which we have frequently upheld as the proper burden on the defense to raise entrapment issue. *United States* v. *Beaver*, —— F.2d —— (2d Cir. October 28, 1971) (Docket No. 71-1329) (if the jury "finds some evidence of government initiation of the illegal conduct, the government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime"); *United States* v. *Bernet*, 433 F.2d 680, 684 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971) and cases cited therein.

Appellant claims that the conduct of the government agent constituted entrapment as a matter of law. This Court has only recently reaffirmed the well-settled rule that, since the entrapment defense is directed to avoiding guilt and not to the propriety of governmental conduct, the issue is one for the jury: *United States* v. *Mascia*, —— F.2d —— (2d Cir. September 8, 1971) (Docket No. 71-1278) and cases cited therein.

Affirmed.

Appendix B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of November one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD
HON. PAUL R. HAYS
HON. JAMES L. OAKES
Circuit Judges:

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILIP GROOB, ADALBERT GROSS,
Defendants,

PHILIP GROOB,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

Appendix B

Order Denying Rehearing In Banc

71-1695

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PHILIP GROOB, ALBERT GROSS,

Defendants,

PHILIP GROOB,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Henry J. Friendly, Chief Judge

December 14, 1971

Appendix B

Order Denying Rehearing

71-1695

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PHILIP GROSS, ADALBERT GROSS,

Defendants,

PHILIP GROSS,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it herby is denied.

J. Edward Lumbard

Paul R. Hays

James L. Oakes

Circuit Judges.

December 14, 1971

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No. 71-901

In the Supreme Court of the United States

OCTOBER TERM, 1971

PHILIP GROOB, PETITIONER

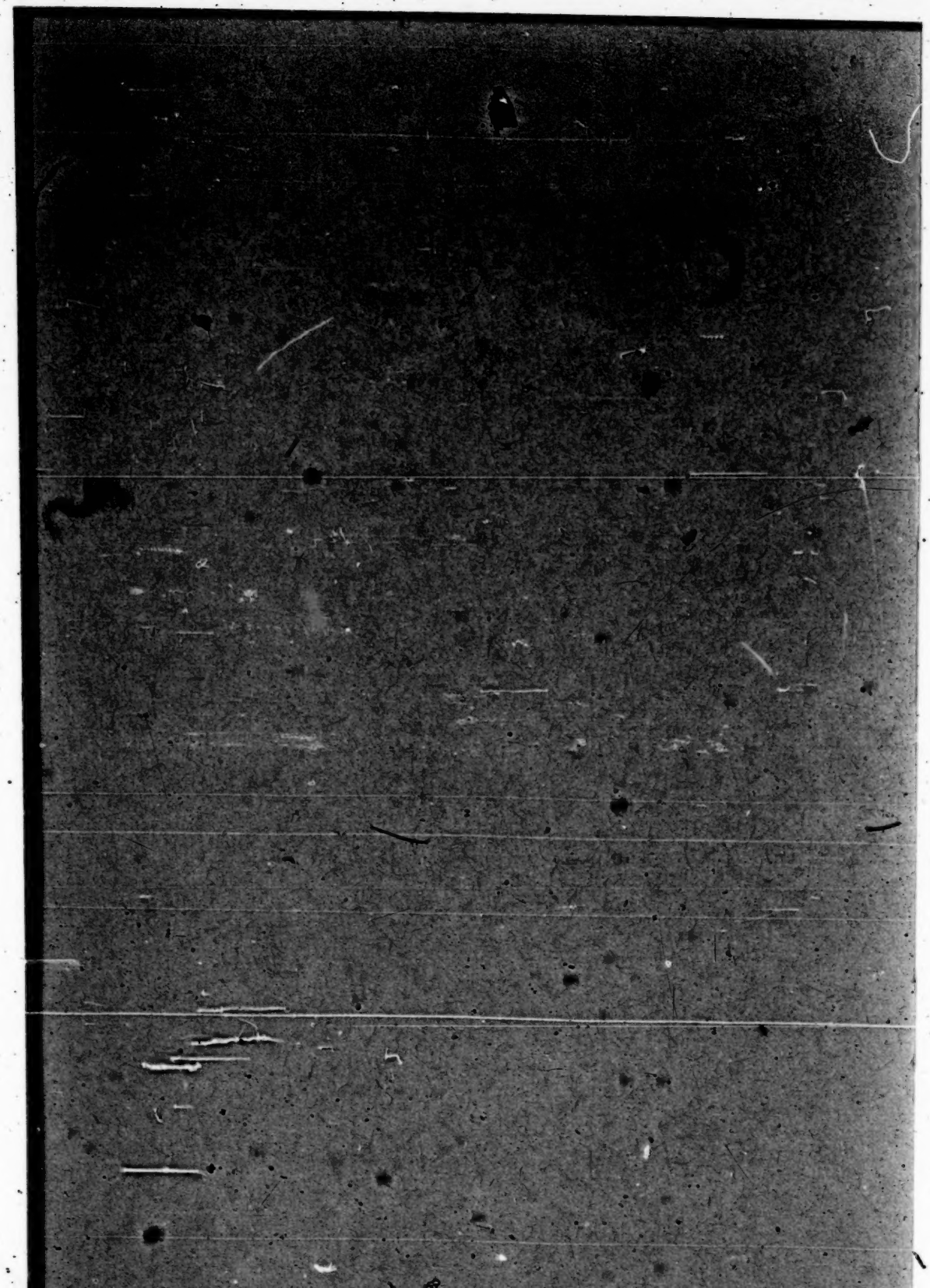
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-901

PHILIP GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Memorandum for the United States in Opposition

After a jury trial in the United States District Court for the Southern District of New York, petitioner, an accountant, was convicted of paying a $700 bribe (Count Two) and conspiracy to pay this bribe (Count One) to an agent of the Internal Revenue Service (Bernard M. Singer).[1] On April 16, 1971, petitioner was sentenced to imprisonment for one year and fined $5,000 on Count One. Six months of this sentence and the sentence imposed on Count Two were suspended. The court of appeals affirmed (Pet. App. A. 21-22).

[1] Codefendant Adalbert Gross, the taxpayer represented by petitioner, pleaded guilty to one of the three counts in the indictment.

459-450-72

In early 1968, Internal Revenue Agent Bernard Singer began an audit of the 1966 personal income tax return of Adalbert Gross, a diamond merchant, and his wife (A. 3).[1] Agent Singer found, and raised questions about, two $15,000 bank deposits reflected in the Gross bank account for 1966. Petitioner told the agent that this money was a gift from Mrs. Gross' father, Mor Fisch. According to petitioner, this money had been buried twenty-five years earlier in a cache in a synagogue in Hungary when Mr. Fisch had fled from the Nazis (A. 4–8). Allegedly Mr. Fisch had returned to Hungary in 1965, found the money and deposited it in a Swiss bank in the name of Mrs. Gross. The agent interviewed Mr. Fisch and asked petitioner to document the story with affidavits, passports, and with bank records. Thereafter, in June 1969, after receiving the final affidavit, the agent referred the case to the Intelligence Division for consideration for fraud prosecution. Recommendation for prosecution was declined (A. 13, Exhibit 1).

In December 1969, Singer advised petitioner of his conclusion to treat the $30,000 as income to the Grosses and told petitioner that he was willing to explain this conclusion to the taxpayer. When petitioner asked if the matter could be compromised, Singer replied that, in light of the single issue of fact involved, he could not make any compromise. Petitioner then told him to think about it and to contact him at his home phone number before business hours if the agent thought anything else (A. 13–15). At this point,

[1] "A" refers to the joint appendix filed in the court below.

Singer informed first his supervisor and then the Inspection Service of the Internal Revenue that petitioner had suggested calling his home phone number (A. 13–16). They discussed the possibility that petitioner might initiate a bribe and Singer was instructed to conduct the audit as he had previously and was told not to solicit a bribe (A. 185–186). On December 24, 1969, Singer telephoned petitioner at his home phone number, discussed the facts of the case with him, declined a renewed request from petitioner to compromise, and arranged to meet petitioner and the taxpayer at petitioner's office. (A. 17–19; Exhibit 4A). This conversation and subsequent telephone calls with petitioner were recorded; subsequent meetings were monitored by a broadcasting device concealed on the agent's person.

On January 27, 1970, Singer met petitioner and Gross. He explained why he was skeptical of the taxpayer's story and, while he reiterated that the matter could not be compromised because of the single factual issue involved, he agreed to discuss the case with his supervisor (A. 24–30; Exhibit 5A, pp. 1–27). At the conclusion of the meeting, petitioner showed Singer to an elevator, asked him if there was anything that he wanted to say that he had not stated before and asked him: "Do you know what you want." (A. 30–31; Exhibit 5A, p. 28). Petitioner then asked Singer to join him for a cup of coffee and walked with him to a nearby jewelry store owned by petitioner's cousin. In a back room, petitioner asked Singer the procedure for making the entire $30,000 nontaxable.

Petitioner then said that he had a certain percentage in mind, like 20 percent. The agent responded "How about 25" and petitioner said "Well, what about my share. I want $500." They then settled on $2,000 for the agent and $500 for petitioner (A. 31–33; Exhibit 5A, p. 30–34). The next day petitioner confirmed that they had a deal (A. 35; Exhibit 6A).

The agent and petitioner met again on January 29, 1970. Petitioner suggested solving the problem of the $30,000 by destroying a previously executed waiver of the statute of limitations. When the agent said that he could not do that without getting himself in trouble, petitioner replied that he never previously had had any problem in similar situations. (A. 38, 40). In the meeting petitioner offered to give Singer seven or eight hundred dollars on the receipt of a copy of the agent's report (Exhibit 7A, p. 3–4), indicating no change in the taxpayer's return. On February 4, 1970, Singer gave petitioner and Gross a copy of the report accepting the Mor Fisch story and showing no tax liability. After reading the report, petitioner and Gross suggested that it would be better if the agent "delete entirely the $30,000 issue and forget about it." After Singer agreed to rewrite the report, petitioner gave him an envelope containing $700. (T. 42–50; Exhibit 8A).

In his own defense, petitioner relied on the defense of entrapment. He testified that following the meeting of January 27, 1970, Singer initiated the bribe by saying "If you pay me the legal fees that you are willing to pay an attorney, I could close the case" (A.

375). He claimed that he agreed to deal with the agent only after a hysterical Gross implored him to deal with the agent (A. 376–378). Petitioner testified that he was "shocked" by the agent's overture, but admitted that he must have gotten over being shocked a few moments later when he asked for $500 out of the deal. (A. 412).

In its instructions upon entrapment, the court charged in part as follows (A. 541–542):

> Thus, in considering the defense of entrapment, you must first consider all the evidence and determine whether or not there is credible evidence that Groob was lured or induced by Agent Singer to have $700 paid to Singer, as was done here, or to conspire with Gross to do so.
>
> If you conclude there is no credible evidence that Groob was so lured or induced by Singer, then you need go no farther with the defense of entrapment; for, if there was no such inducement or luring here, Groob was not entrapped. On the other hand, if after considering all the evidence you conclude that there is credible evidence that Groob was lured or induced by Singer to participate in the payment of the $700, you must then go on to consider a second question. That is, whether or not the government has established beyond a reasonable doubt that Groob, prior to such inducement, was ready and willing to commit the offenses charged and was merely awaiting an opportunity to do so. Or, to put it another way, that he had a predisposition to commit these offenses—that is, he was already willing and ready to

> pay or to participate in the payment of the $700 to Singer. And you cannot convict unless you find that the government has established this beyond a reasonable doubt.

I. Petitioner argues that the quoted charge improperly placed upon him "the burden of proving his innocence" (Pet. 11). Petitioner's characterization of the charge is simply inaccurate. The entrapment charge as it was given in this case and as it is usually given in the Second Circuit placed no such burden upon the defendant.

In *United States* v. *Brawer*, 450 F. 2d 799 (C.A. 2), petition for certiorari pending (No. 71-944), dealing with entrapment instructions—unlike those in this case—explicitly placing upon the defendant the burden of proving inducement "by a fair preponderance of the evidence," the court noted that it would be preferable that courts "not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed upon two different parts" (450 F. 2d at 805). The court in *Brawer* stated: "In explaining the burden on proof on entrapment, it will be enough to tell the jury that if it finds some evidence of government initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime" (*Ibid.*). Quoting this language from *Brawer* the court of appeals in this case held that the instructions correctly complied with that standard (Pet. App. 22).

Unable to find any language in the charge imposing any explicit burden on the defendant, petitioner seizes

on the court's use of the term "credible evidence" of inducement, which he contrasts with the term "some evidence" suggested in *Bravet, supra*. However, as the court of appeals observed "credible evidence" is virtually identical to "some evidence" (Pet. App. 22).

The entrapment charge as used in the Second Circuit requiring the jury to find "some evidence" or "credible evidence" of inducement by the government before the entrapment defense is raised, is not in conflict with other circuits. Thus, in *Kadis* v. *United States*, 373 F. 2d 370, 373–374, the First Circuit rejecting the so-called bifurcated entrapment defense, stated:

> * * * Henceforth we will look, singly, at the ultimate question of entrapment. *If the defendant shows*, through government witnesses or otherwise, *some indication that a government agent corrupted him*, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness. * * * [Emphasis added.]

Similarly, the Fourth Circuit in *United States* v. *DeVore*, 423 F. 2d 1069, 1071 required "some indication" of inducement by the government:

> In *Kadis* the First Circuit correctly formulated the rule: *if the defendant*, through government witnesses or otherwise, *shows some indication that he was corrupted by government agents*, the burden of disproving entrapment will be on the prosecution. * * * [Emphasis added.]